APPENDIX B

No. 73-2400

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

STATE OF ALASKA, *Defendant-Appellee.*

On Appeal From The United States District Court For The District of Alaska

SUPPLEMENTAL BRIEF OF THE STATE OF ALASKA, APPELLEE

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The reply brief of the United States is misleading and erroneous. Continuing the strategy it pursued in the trial court, the United States seizes upon more bits and pieces of evidence here and there in disregard of the record as a whole. In other instances it makes factual claims and legal arguments which are extravagant and demonstrably wrong. And, as the State sees it, Appellant has distorted simple principles of law

in a vain attempt to cover up an almost total lack of evidence to support its position.

The stakes at issue here are so important to the economic welfare and future of its people that Alaska has deemed it appropriate to ask leave for the filing of this short supplemental brief.

I.

ALL OF COOK INLET IS INLAND WATER, NOT TERRITORIAL SEA

It is not necessary to elaborate extensively on the point made in Alaska's brief that the United States impermissibly narrows the requirements for an historic bay in arguing that the only evidence of sovereignty over inland waters is evidence of those acts which interfere with innocent passage of foreign nations (Compare pp. 35-40, Alaska's brief with p. 8 United States reply brief). But it cannot be over-emphasized that the United States strains beyond the breaking point the *Juridical Regime,* the authority upon which it relies. Nothing could be clearer than what is said at Paragraph 163 of that document:

> ". . . the dominant opinion, as gathered from the statements assembled in the memorandum [*Historic Bays,* Memorandum by the Secretariat to the United Nations, Document A/Conf. 13/1] (Exhibit 52), seems to be that 'historic bays' the coasts of which belong to a single state are internal waters. This was to be expected considering that it is generally agreed that the waters inside the closing line of the bay are internal waters and that the territorial sea begins outside that line."

The United States argues that "the evidence is uncontested that fisheries agents recognized that foreign vessels had the right of innocent passage in Cook Inlet" (p. 8, Appellant's Reply Brief). From that statement it concludes that Cook Inlet is at best territorial sea. And it blandly asserts "the State is entirely wrong about what the record discloses." Here, it would appear, we have an argument about what is or what is not in the record—a simple dispute which certainly can be resolved by looking to the record sources upon which Appellant relies. Appellant has cited a number of depositions, one of which was Skerry Dep. pp. 29, 31. There we find the following succinct testimony by Mr. Skerry (p. 29):

> "Q. Would you have required, for instance, if a foreign vessel wanted to fish Cook Inlet with gear, would they have been required, also, to register?
>
> A. He wouldn't have been allowed in there in the first place. He could have come in Force Majeure or something of this sort. But to fish, no."

This hardly reflects a note of welcome to foreign vessels from Mr. Skerry, who was agent in charge of the Cook Inlet District for the federal Bureau of Commercial Fisheries from 1955 through 1959. It may be that on occasion he saw shipping vessels, foreign or otherwise, crossing Cook Inlet en route to Anchorage—a fact of no legal significance whatever. The thrust of his testimony was his claim of sovereignty over Cook Inlet on behalf of the United States Government.

Appellant cites Studdert Dep. p. 22. There we find Studdert, another federal official, testifying with regard to foreign vessels:

"Q. And why would you have gotten the vessel out of there, Mr. Studdert?

A. Well, if it was a foreign ship, why you would not only get her out, but you would seize the ship, you know, if you could."

Another record source upon which the United States relies is Branson Dep. p. 39, who testified:

"Q. You are not aware that they [Japanese ships] ever entered the area bounded by a line from Cape Douglas through the Barren Islands on to Cape Elizabeth?

A. I've never seen one in there.

Q. And what about vessels of any other nation?

A. North of a line between Cape Douglas and the Barren Islands, no" (pp. 39-40).

A Mr. O'Dale operated a mail boat in Cook Inlet in the early 1900's. Appellant relies upon his deposition, pp. 20-21. There we find him testifying with regard to foreign boats as follows:

"A. No. We never had any foreign boats in there at that time. But there was a foreign boat come in. It was a freighter or a passenger boat or something which they had a license to do."

"Q. Did you ever see any foreign fishing boats?

"A. No."[1]

---

1. There are other deposition references upon which Appellant relies. Since the Court can and undoubtedly will study these references, we shall not prolong this brief by extensive quotes from the record. For convenience, however, we have attached an Appendix in which each deposition reference, including more extensive quotes from the Skerry, Studdert, Branson and O'Dale depositions, are dealt with more fully.

It is true that Anchorage is and has been for many years, the largest seaport in the State of Alaska. Foreign vessels come to Anchorage as they do to other American ports such as New York and San Francisco. And, as countless thousands of people have seen foreign vessels traversing San Francisco Bay to enter San Francisco Harbor, so there is evidence here that witnesses have seen some few foreign vessels crossing Cook Inlet to enter the Anchorage Harbor. This is the most that can be said of Appellant's evidence of foreign shipping.[2]

But the presence of a few foreign shipping vessels in Cook Inlet is no more evidence that Cook Inlet is a territorial sea than the presence of a thousand foreign shipping vessels in San Francisco Bay is evidence that San Francisco Bay is a territorial sea. The presence of foreign vessels in Cook Inlet is adequately explained by Colombos, *The International Law of the Sea* (6th Rev. Ed., (1967) pp. 87-88) wherein he stated:

> "Interior or national waters, on the other hand, consist of a state's harbours, ports and roadsteads and its internal gulfs and bays, straits, lakes and rivers. In these waters, apart from special conventions, foreign states cannot, as a matter of strict law, demand any rights for their vessels or subjects, although for reasons based on the interests of international commerce and navigation, it may be asserted that an international custom has grown in modern times that access of foreign vessels to these waters should not be refused except on compelling national grounds."

2. We have previously dealt with the trial court's treatment of the few isolated instances of Canadian halibut fishing boats.

II.

THE EVIDENCE OF SOVEREIGNTY OVER COOK INLET IS CLEAR

The United States clearly misreads the *Juridical Regime* in asserting that a fair reading of it, and citations contained therein, "establishes that acts must affect foreign nations to constitute sovereignty" (Rep. Br. p. 4). A fair reading of the *Juridical Regime* must lead to the conclusion that there is no hard and fast rule as to what acts must be done to constitute sovereignty. Two criteria, however, stand out: *First,* the acts must be under municipal (i.e., domestic) law of the nation exercising the authority, *Juridical Regime,* Paragraphs 85-93. *Second,* the acts must be undertaken to the extent—but only to the extent—necessary to maintain authority over the area, *Juridical Regime,* Paragraphs 98-103. Contrary to the United States' assertion that the critical question relates to the individuals or entities against whom sovereignty is exercised, the critical question in fact is under what authority was the sovereignty exercised.

The proof of Alaska, discussed in its brief, demonstrates that, measured by the foregoing principles, there was uncontradicted and ample evidence of the exercise of sovereignty over Cook Inlet by Russia, the United States and Alaska. First, the intent of these governments to exercise sovereignty was expressed by deeds. Second, sovereignty was exercised to the extent necessary to maintain it both with respect to domestics and aliens.

A. Russian Sovereignty

While it is true that the United States protested the Ukase of 1821 (Rep. Br. p. 13), it does not follow

that Russia abandoned its claim to Cook Inlet. Russia by treaty permitted the United States for ten years subsequent to 1824 to "frequent without any hindrance whatever, the interior seas, gulfs, harbors, and creeks upon the northwest coast for the purpose of fishing and trading . . ." (Ex. Y, p. 154). After having been informed by Russia that the ten year period provided for in the 1824 treaty expired, the United States Ambassador in St. Petersburg wrote the State Department in 1838 (Ex. X, pp. 243-244):

> "The stipulated freedom to trade unmolested within the interior seas, bays, creeks, and harbors of the northwest coast, being regarded under our construction of the treaty, as solely applicable to occupied places, and having ceased upon the expiration of ten years, it becomes essential to the safe prosecution of American enterprise and traffic in these remote regions that we should ascertain, if possible, which of the interior seas, bays, creeks, and harbors fall, by actual Russian settlement, under exclusive Russian dominion."

Of course the evidence is undisputed that Cook Inlet, by actual Russian settlement, fell under exclusive Russian dominion (See pp. 8-9, Alaska's brief).

B. United States Sovereignty, Regulations And Proclamation

The United States relies on an absence of express legislative or executive proclamation that the area in question is internal waters (Rep. Br. p. 7). The argument of the federal Government proceeds with the proposition that the United States has traditionally recognized that jurisdiction over territorial waters ex-

tended only 3 miles from the coastline. This being so, the United States disposes of the White Act and the Alien Fishing Act by construing the language thereof as indicating an assertion of jurisdiction only over the area in Cook Inlet within 3 miles of the coastline.

The foregoing argument is misplaced for at least two reasons. *First,* while it is true that the three mile limit has been a cornerstone of the United States' position in international law, it is likewise true that the doctrine of historic bays has been equally ingrained. Witness, for example, such bays as Delaware Bay and Chesapeake Bay, traditionally claimed and recognized as United States historic bays.

Thus, there are two co-existing and well established doctrines of law—the 3-mile limit and historic bay doctrines. When the United States seizes upon the first doctrine to the exclusion of the second, it assumes the point at issue, to wit: that waters outside the 3-mile limit from the Cook Inlet coastline were not claimed as an historic bay. The fallacy of such reasoning is at once obvious.

Second, the argument will not withstand close historic research. The language of the various statutes and proclamations (The Alien Fishing Act, The White Act, The Southwestern Alaska Fisheries Reservation) is not an express assertion of sovereignty over all of Cook Inlet because, so Appellant argues, the language in the proclamations or statutes, such as "waters of Alaska under the jurisdiction of the United States" is not defined. Let us assume, arguendo, that the phrase "waters of Alaska, etc." is vague or inconclusive. This brings us necessarily back to the fundamental question: Was jurisdiction

(or sovereignty) asserted by the United States over Cook Inlet as waters of Alaska? Put another way, the question is: Were the waters of Cook Inlet claimed by the United States as "waters of Alaska under the jurisdiction of the United States?" To answer the question, it is necessary to trace the history of various statutes that have been enacted with respect to the waters of Alaska. It is necessary also to depict the claims to Cook Inlet at the time each statute and regulation was promulgated.

1. R.S. 1956 and the Kodiak Case

The earliest statute, Article 1956, was involved in the *Kodiak* case. It provided that "no person" shall kill otter or other fur-bearing animals "within the limits of Alaska territory or in the waters thereof." Thus it was that the Court in the *Kodiak* case was faced with the same contention now urged by the United States, to-wit: that since the defendant had allegedly killed fur-bearing animals more than 3 miles from the shoreline of Cook Inlet, the statute was not applicable, the phrase "in the waters thereof" being construed to mean a distance of 3 miles from the shore of Cook Inlet. As we see it, this is precisely the contention now urged by the United States.

The Court said:

> "The contention is not a valid one.
>
> * * *
>
> . . . it can hardly be claimed that any portion of Cook's Inlet is 'high seas', within the accepted meaning of the phrase, for it is well landlocked by islands extending from Kodiak Island to Cape Elizabeth, on the east, and can only be entered by

coming in near some of these islands, or by the way of Shelikof straits.
[53 Fed., p. 128]"

The Court, it will be noted, recognized a fundamental, geographical distinction between Cook Inlet and areas such as the Bering Sea (see *Whitelaw v. U. S.*, 75 Fed. 513 (9th Cir. 1896)) and the open Gulf of Alaska (see *Pacific Trading v. U. S.*, 75 Fed. 519 (9th Cir. 1896)).

Having taken the unique geographical status of Cook Inlet into consideration, the Court made clear that its basis for jurisdiction rested upon assertions of sovereignty over Cook Inlet by the United States:

"To apply this reasoning to the case at bar, it may be said that Commander Johnson, with the United States ship Mohican, was, by orders of the government, cruising along the coast of Alaska, and within the waters of Cook's Inlet at the time he made this seizure. How, then, did it happen that he received such orders. It must be presumed, I think, that they were given in the assertion on the part of this government of territorial jurisdiction over these waters. And, if I am correct in this, then it is not the province of courts to participate in the discussion of the questions arising out of this claim of jurisdiction or dominion, for they are of a political nature, and not judicial. National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, when Congress and the President assert dominion and sovereignty over any portion of the sea, or over any body of water, the courts are bound by it." (53 Fed. p. 130)

The quoted language of the Court in *Kodiak* is simply a paraphrasing of the requirement that, in the

emergence of historic title to inland waters, there must be an assertion of jurisdiction or sovereignty by the claiming nation—a principle of law which no one, including Appellant's counsel, would contend has been overruled.

In further attacking the *Kodiak* decision, the United States has argued the KODIAK was an American vessel and its seizure was not an act effective upon foreign nationals (Appellant's Rep. Br., p. 15). While we would concede that the clearest exercise of dominion is that exercised against foreigners (when and if they appear), the United States misses the point of the *Kodiak* case. Obviously, neither a United States citizen nor an alien can be convicted of a statutory violation unless he comes within the ambit of the statute. In the *Kodiak* case the statute, as we have seen, prohibited any person killing fur-bearing animals "within the limits of Alaska territory, or the waters thereof." If the defendant, whether he be American citizen or alien, had taken the fur-bearing animals outside the waters of Alaska, he obviously would not have violated the statute. This necessarily led the Court in the *Kodiak* case to a determination of the limits of the waters of Alaska, a decision which, in the light of the express wording of the statute, was an essential finding in determining the guilt or innocence of the defendant, irrespective of his nationality. Thus, the Court's decision that all of Cook Inlet was within the national dominion and sovereignty of the United States was just as clear an assertion of sovereignty by the Executive and Legislative Branches of our Government as if the indictment had been brought against a foreigner. The point was expressly made by this Court in *Whitelaw v. U. S. (LA NINFA)*, 75 F. 513 (9th Cir.

1896). There Article 1956, insofar as the Bering Sea was concerned, had been amended so as "to include and apply to all of the dominion of the United States in the waters of the Bering Sea; . . .," (75 F. 513, 515). Against the Government's argument that this statute could reach American citizens even on the high seas, the Court stated:

> "These questions have no bearing as to the interpretation to be given to the statutes under review. These statutes, whatever their interpretation may be, must be applied to citizens and subjects of all nations, and were not intended to apply only to citizens, subjects, and vessels of America." (75 F. p. 518)

Hence, the statute was operative against aliens and citizens alike in waters over which the United States had jurisdiction.

Appellant argues that *Kodiak* was overruled by this Court in *Whitelaw v. U. S., supra,* and *Pacific Trading Co. v. U. S.*, 75 Fed. 519 (9th Cir. 1896). Since the *Kodiak* decision was not even mentioned in either of these decisions, this is indeed a bold assertion. Certainly it was not expressly overruled; and neither was it impliedly overruled. The question of the dominion of the United States in the Bering Sea had been settled by an arbitration award, pursuant to treaty between United States and Great Britain, in the Bering Sea arbitration. Thus when this Court was faced with the status of the Bering Sea in *Whitelaw,* it simply, and quite properly, stated:

> "It is undoubtedly true, as has been decided by the Supreme Court, that in pending controversies doubtful questions which are undecided, must be met by

> the political department of the Government. . . . But in the present case there is no pending question left for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty, when used and agreed to, becomes a supreme law of the land. It binds courts as much as an act of Congress."
>
> (75 Fed. 513, 517-518)

As Judge von der Heydt pointed out in the Court below, when he addressed himself to the facts peculiar to this case and stated:

> "The Bering Sea Fur Seal Arbitration did not adjudicate the status of Cook Inlet. In fact the United States lost the arbitration principally because it could not prove that Russia exercised sovereignty over the Bering Sea."
>
> (Findings of Fact No. 21) (R. 3782)

The decision in *Alexander,* decided the same day as *Whitelaw* involved the open high seas in the Gulf of Alaska, an area over which no dominion had been asserted and an area recognized as geographically different from Cook Inlet. (75 Fed. 519)

The *Kodiak* decision was rendered in 1892. Presumably it was published and widely distributed and it is Alaska's contention that all foreign countries knew, or should have known, its content.

2. The Alien Fishing Act, The Southwestern Alaska Fisheries Reservation and The White Act

With this precedent before it—a clear-cut judicial holding that Cook Inlet was water over which the United

States had asserted jurisdiction—Congress enacted The Alien Fishing Act in 1906 and The White Act in 1924. The operative words in The Alien Fishing Act were "waters of Alaska under the jurisdiction of the United States," while in The White Act the key words were "any of the waters over which the United States has jurisdiction." Both statutes have substantially the same language and both have language almost identical with Article 1956.

Can it be seriously argued that the Congress did not or could not have taken the *Kodiak* precedent into account when, on two occasions, 1906 and 1924, it enacted significant legislation affecting Cook Inlet? Or can it be seriously contended that foreign nations were not put on notice of the claims of the United States to Cook Inlet? It is little wonder that Appellant is now left only with the argument that this Court has overruled the *Kodiak* decision.

Be that as it may, Appellant apparently would have this Court ignore the next 35 years during which time, from 1924 to 1959, the Executive Department, continuously and year after year, defined Cook Inlet as including "*all* adjoining waters north of Cape Douglas and west of Point Gore (including the Barren Islands)" (Emphasis added).

To say that these executive regulations are not clear is to defy the English language, particularly when their judicial and legislative precedents are taken into account. To claim that these regulations were not brought to the attention of all foreign nations is to ignore the fact that each year, for more than three decades, they were published and distributed throughout the world.

We suggest that, if today the author of the regulations was given the chore of asserting United States sovereignty over Cook Inlet, he would have difficulty in finding clearer and more precise words than the words "all adjoining waters north of Cape Douglas, etc."

3. Enforcement of Fishery Laws and Regulations in Cook Inlet

(a) Patrols

The United States' assertion that there was no need to patrol Cook Inlet until 1947 and that such patrols thereafter were conducted pursuant to treaty clearly disregards the *Kodiak* case and the unrefuted testimony of William Studdert who arrested two American halibut vessels fishing without a permit in the disputed area in 1924. Moreover, the uncontradicted testimony of numerous witnesses is that it was The White Act regulation and not any treaty that gave them authority to enforce The White Act and The Alien Fishing Act over the entire disputed area. Typical of that testimony is that of Don Roberts, who from 1951 through 1954 was assigned to the Cook Inlet area and was later the federal Bureau of Commercial Fisheries Agent for enforcement purposes. Mr. Roberts testified:

> "Q. . . . in 1954 while you were agent in charge of enforcement in the Cook Inlet, you did determine the geographic area over which you had authority to enforce these regulations?
>
> A. Yes, from these published regulations.
>
> Q. All right. In other words, you did determine the area, and in making that determination you relied on these published regulations?

A. That is right.

. . .

Q. All right. Now, you stated you had determined the geographical area over which you had authority to enforce the regulations in that you had relied on the regulations. When you referred to the regulations, was it those 1954 regulations which you have before you?

A. Yes, this would be correct.

Q. Now, is the regulation upon which you relied set forth at page 34?

A. Yes.

Q. And what regulation is that?

A. Cook Inlet Area, Part 109.

Q. All right. Now, would you read the number, and read the regulations please?

A. You want which? You want the particular section, or—

Q. That one you read, the Cook Inlet Area.

A. Well, Cook Inlet Area, Section 109.1. 'Definition of Cook Inlet Area is hereby defined to include Cook Inlet and its tributary waters and all adjoining waters north of Cape Douglas and west of Point Gore. The Barren Islands are included within this area.'

Q. All right. Now, that is the regulation you relied on; is that correct?

A. Yes, that is correct."

(Tr. 313-314).

That testimony is typical of numerous witnesses who testified that the regulation above quoted constituted the authority for patrolling the entire Inlet for purposes of enforcing The Alien Fishing Act and The White Act. See pp. 24-50, First Amended Trial Brief of Alaska (R. 1736-1762).

(b) Specific Acts of Enforcement by the United States and Alaska Within the Disputed Area of Cook Inlet

The United States seeks to disregard the fact that officials of both the United States and Alaska made documented arrests of individuals and vessels within the disputed area. The basis for this disregard is that the charges upon which the arrests were grounded were dismissed in some instances (Rep. Br., p. 23). The United States fails to indicate that the dismissals were not on jurisdictional grounds, but, like the *Kodiak* case, were dismissals based on the merits.

Hence, the charges against Court Marchant in 1951 were dismissed because the spacing of the drift gill nets was a matter which he could not control (Marchant Dep. p. 9). A similar result was reached in the 1951 case against George A. Mosher (Mosher Dep., p. 7).

Earl Solie was arrested for a spacing violation in 1951. His case was dismissed because the error in spacing was unavoidably caused by the tide (Solie Dep., pp. 7-8). A similar charge was levelled against Harley Adams in 1957 and it was likewise dismissed on the basis that the tidal action made the net entanglement unavoidable (Adams Dep., p. 8).

Sverre Omsund was arrested in 1957 for a violation in the disputed area and was fined $150.00 (Omsund Dep., p. 6).

Claude Shea, who was a Commercial Fisheries Agent in Cook Inlet for the Fish and Wildlife Service in 1953, while on patrol observed a vessel in the disputed area with its gear out during a closed period. The vessel and gear were forfeited (Shea Dep., pp. 14-16).

In 1970 Frank De Rossitt was arrested by the Alaska Department of Fish and Game for fishing in a closed area. The case was dismissed because an error in the wording of the regulation made it unenforceable (Tr. 666). The same result occurred in the case of *Kjarten Ask* (Tr. 673).

Based on the foregoing, it is clearly inaccurate for the United States to state, as it does at page 24 of its reply brief, "However, in at least three of the seven instances relied upon by Alaska, there is no evidence in the record to establish the basis of the dismissals."

4. The Tariff Commission Maps

The United States comments on the 1930 Tariff Commission chart incident and states that the charts were withdrawn by the Secretary of Commerce because "he thought it unwise to invite the attention of foreign nations to the extent of United States jurisdiction off the coast of Alaska." (Rep. Br., p. 23). The best comment on the United States' interpretation is the reasoning of the Secretary of Commerce in the exhibit itself. In his letter dated October 20, 1930, the Secretary of Commerce wrote concerning an alleged line which caused the high seas to indent into Cook Inlet:

> "In my opinion, the designation on this chart of territorial waters and high seas may prove exceedingly harmful and detrimental to American fisheries industry. In spite of the statement that the chart has no official sanction or significance in respect to what constitutes high seas or territorial waters, it seems to me that it is, in effect, *an invitation to foreign fishery interests to invade waters which heretofore have always been considered as open only to*

nationals of the United States." (Ex. AR) (Emphasis supplied).

Hence, the charts were withdrawn (Ex. AR).

5. The Gharrett-Scudder Line

The United States asserts in its reply brief that it is surprised in that Alaska claims that the Gharrett-Scudder line is a system of straight base lines (p. 26). Nowhere does Alaska claim that the Gharrett-Scudder line is a straight base line as that term is used in the Convention on the Territorial Sea and Contiguous Zone. Indeed, it could not be, since the line pre-dated the Convention by at least one year. The line is thus no more a straight baseline than any other line which must of necessity be a "baseline" from which to measure the territorial sea (Ex. D-B, E-X; Dep., Scudder, p. 10).

The United States attempts to derogate from the effect of the Gharrett-Scudder line by calling it a fisheries management line (Rep. Br., p. 29). That argument simply enhances the significance of the line because of the fact that, in Cook Inlet, fisheries management was of the essence of sovereignty. Moreover, the argument of the United States ignores the fact that the purpose of the line was to delineate the high seas from waters of Alaska (Ex. DC, DD). The regulation which the line depicts goes beyond fisheries management purposes. The regulation and the line describe the "waters of Alaska" in terms of the 3-mile limit. The fact that the line describes the 3-mile limit in areas, such as the Arctic Coast, where there could not conceivably be any salmon net fishing, underscores the point. Thus, there is clearly indicated a broader purpose than that of fisheries management.

The Gharrett-Scudder line represents more accurately than anything else, what in fact the United States claimed to be historic boundary of its jurisdiction in Alaska. This claim was sent to and acquiesced in by Canada.

6. Alleged Canadian Halibut Fishing

The United States in its reply brief cites evidence which it asserts shows that there was no consent by the United States to Canadians fishing for halibut in Cook Inlet (Rep. Br., p. 36). But, upon consideration of all of the evidence, the trial court resolved this factual issue in favor of Alaska (Finding 101; R. 3799-3800). On this point the testimony of a witness called by the United States, Howard Baltzo, is significant. Mr. Baltzo testified that the halibut fishery in Cook Inlet had less priority in the United States' view than the number one fishery, salmon. If a Canadian vessel fishing for salmon had been observed more than three miles from shore in Cook Inlet, Mr. Baltzo was certain that the vessel would have been boarded, or at the very least permission to board would have been sought (Tr. 186-187).

C. Alaskan Sovereignty—Shelikof Strait Incident

The United States argues in its reply brief that the agreement entered into by the Japanese fishing company (Ex. IV) did not pertain to Cook Inlet (pp. 31-32). The Japanese Government was not laboring under this misapprehension. On the contrary, it expressly recognized that the agreement entered into between Alaska and the Japanese fishing company applied to Cook Inlet. The protest of the Japanese Government stated in part:

"The state authorities kept the captains and the ships concerned under detention until about 10:30 o'clock of April 19, at which time the men were set free on bond, and the ships released, after being made to agree that the fleet would not conduct fishing operations in Shelikof Strait and *Cook Inlet.*" (Ex. II) (Emphasis supplied).

III.

CONCLUSION

In *Louisiana,* the Supreme Court stated:

"Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland." (394 U.S. 11, 23).

Appellant apparently would ignore this language in *Louisiana,* but instead seizes upon a footnote reference in the opinion to historic territorial seas.[3] In the process the United States would now have this Court create from

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3. There may be other bodies of water, such as straits or archipelagoes which are not necessarily inland. Thus the Supreme Court in *Louisiana* stated: "But it has also been recognized that *other* areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters, by the manner in which they have been treated by the coastal nation." (394 U.S. 11, 23) (Emphasis added) As to these other areas, the Court's footnote reference to historic title over territorial waters might be applicable, depending, as the Court noted, on the kind of treatment or jurisdiction exercised over the area. That is to say, as to these other waters the nation may have exercised such sovereignty as to make them historic territorial seas rather than historic inland waters. Here we are not dealing with another area of water, but we are dealing with waters in a bay that are inland.

whole cloth a novel juridical entity—an historic, necessarily inland, territorial sea bay. This would appear to be a self-contradictory kind of bay and Cook Inlet would be the first of its kind in all of jurisprudence. For the United States has cited no case, and neither has Alaska, where a historic, geographically inland, water bay has been declared to be a historic territorial sea in the sense these terms are currently used. Such a creation is surely a figment of imagination.

The trial court, so Alaska contends, properly and necessarily considered the geographic factors pertaining to Cook Inlet. When these factors were taken into account, the trial court had to find, and the United States conceded, that Cook Inlet was a landlocked, necessarily inland bay (see, for example, Finding 5; R. 3779). So much for geographical factors.

The lower court then turned to a consideration of the historical factors. Here the evidence adduced by Alaska accounts in large part for the massive record now before this Court. The trial judge followed the rule enunciated in *Louisiana* wherein the Supreme Court stated:

> "Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters. There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic waters. But because the concept of historic water is still relatively imprecise and *its application to particular areas raises*

primarily factual questions, we leave to the Special Master—as we did in *United States v. California*—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays." (394 U.S. 11, p. 75) (Emphasis added).

We return, then, to Alaska's original hypothesis. The parties are in substantial agreement on the outlines of the doctrine of historic inland bays and on the type of showing which must be made in order to establish a claim to historic inland waters. This being so, the application of the doctrine to the particular area of Cook Inlet raises primarily factual questions which should be left to the trier of the facts. These questions engaged the attention of the trial judge throughout an extensive trial on the merits. His factual findings are squarely supported by the record. In any event, they are not clearly erroneous; hence, they should be affirmed.

Dated, Juneau, Alaska,

January 9, 1974.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

The evidence cited by the United States does not support the claims the United States attributes to it. An enumeration of that evidence follows:

1. *Wilson Deposition.* (Mr. Wilson was a Fisheries Management Enforcement Officer in Cook Inlet from 1955-1962)

(a) Page 14:

"Q. Did you observe any Canadian vessels that may not have been fishing in Cook Inlet?
A. Yes.
Q. Where did you observe them?
A. I have seen them at anchor in Seldovia Bay, and I have seen them fishing offshore east of Chugach Islands.
Q. By 'offshore' do you have any idea as to how many miles offshore, with reference to more than three or less than three?
A. Well, it could have been probably between three and five, somewhere around there."

(b) Page 20:

"Q. Do you recall the year when you saw the Canadian vessel—where was it in Cook Inlet?
A. Seldovia.
Q. Seldovia. Do you recall the year?
A. No.
Q. Would you give a general range? Was it early in the 1950's or late in the 1950's?

A. No, I really couldn't. I can't connect it with any other activities.

Q. Do you know anything about circumstances of their being there?

A. I believe I heard at that time they were just in there to wait out their weekly closed period."

Seldovia Bay is without dispute inland waters of Alaska even under the United States' theory (Ex. B). The only possible inference is that foreign vessels were permitted, unmolested, even in inland waters. The area "off shore east of Chugach Islands" may not be in the disputed area. In any event Canadian halibut fishing is, for reasons set forth in Alaska's brief (pp. 28-31), insignificant and not controlling so far as the issues in this litigation are concerned.

2. *Skerry Deposition* (Mr. Skerry was agent in charge of the Cook Inlet District for the Bureau of Commercial Fisheries from 1955 through August 1959)

(a) Page 29:

"Q. Would you have required, for instance, if a foreign vessel wanted to fish Cook Inlet with gear, would they have been required, also, to register?

A. He wouldn't have been allowed in there in the first place. He could have come in Force Majeure or something of this sort. But to fish, no.

Q. What is the basis upon which you make that statement?

A. Well, to my knowledge, there is no law that I can recall precisely, but foreign vessels were not permitted to fish in the lines as drawn on this—set out in the regulations. In other words, we considered that that was Cook Inlet and it was for American fishermen."

(b) Page 31:

"A. I can't recall. I think what you are perhaps thinking about is the possibility of some Canadians fishing for halibut [sic]. I have no knowledge that any Canadian long liners did, in fact, fish in the Cook Inlet area. I know they came in Force Majeure as any other vessel is permitted to do. To fish, I can't say.

Q. What do you refer to when you speak of Force Majeure?

A. I am talking about conditions of storm and wind, when winds get to 60 knots or more.

Q. In other words, it is something where the vessel is in peril and has to come in to shore for its physical safety?

A. Right."

This testimony demonstrates what the *Juridical Regime* asserts—that sovereignty over Cook Inlet as inland waters was exercised by excluding foreign fishermen therefrom, except for the obvious humanitarian considerations given their safety. Thus, a foreign vessel could enter Cook Inlet, and even bays such as Seldovia Bay which are under any theory inland waters, if its physical safety demanded it.

3. *Larsen Deposition* (Mr. Larsen was agent in charge of management and enforcement in Cook Inlet for the period 1945 through 1958)

(a) Page 34:

"Q. Now, so far as you can remember, within the period 1945 through 1958, when you were in the Cook Inlet area, were there any foreign fishing activities carried out within the area designated on Deposition Exhibit 1 as Cook Inlet?

A. Well, from time to time the Canadian halibut fishing boats would be found in that area.

Q. All right.

You are talking about the area generally north of the line from Cape Douglas to Gore Point?

A. Yes.

Q. All right."[1]

4. *Costello Deposition* (From 1951 through 1955 Mr. Costello was the Fishery Management Biologist in charge of the Cook Inlet District, Alaska)

(a) Page 29:

"Q. During the time when you were in the Cook Inlet District were you aware or did you observe any activities by foreigners, by foreign fishing vessels in the area described as Cook Inlet as it appears on Deposition 1?

A. The only occurrence that I can call clearly to mind, and I can't be sure of the year, was two boats that were said to be Canadian boats were fishing somewhere in the area between Seldovia and Homer. They were apparently halibut fishing although I didn't see them put their gear in the water or anything. But they were somewhere in Kachemak Bay."

(b) Page 41:

"A. Well, sighting of a foreign vessel in Cook Inlet certainly would not be a violation.

Q. If you saw a foreign vessel fishing more than three miles from shore in Cook Inlet would that

1. Mr. Larsen later testified that he could recall no specific instances or dates of Canadian halibut fishing in Cook Inlet, and that the frequency of his sightings was "very, very little." (Larsen Dep., p. 35)

sighting be routine or would you take the other measure of which you previously spoke?

A. If this had of occurred, as a matter of judgment, I feel I would have requested information from my superiors.

Q. From your superiors where?

A. In Juneau.

Q. In Juneau?

A. Yes.

Q. Before you seized the vessel or took any further action?

A. Yes."

(c) Page 43:

"Q. You spoke of a second incident in which you said you observed two Canadian vessels fishing in Cook Inlet or in the Cook Inlet area, in Kachemak Bay area, correct?

A. I have to qualify that. I didn't actually observe them fishing. The vessels were anchored there.

A. Presumably they were halibut fishing boats and possibly they were fishing but I did not actually identify them as foreign vessels myself. They were pointed out to me as Canadian vessels."

5. *Baltzo Deposition* (From 1950 through 1959 Mr. Baltzo was Assistant Regional Director of the Fish and Wildlife Service for Alaska)

(a) Page 20:

The deposition of Charles Harold Baltzo was not introduced in evidence. Another portion of that deposition was used for purposes of cross-examination of Mr. Baltzo by way of impeachment (Tr. 185).

The foregoing quoted portions of the Larsen and Costello depositions merely reiterate the United States'

argument that Canadians were permitted to fish for halibut in Cook Inlet. As shown in Alaska's brief, the evidence proved and the Court found that such evidence was disputed and not determinative of the status of Cook Inlet as inland water (pp. 28-31, Alaska brief). In any case, the quoted testimony fails to show the existence of the right of innocent passage. In fact, the Costello testimony supports an inference that the Canadian vessel was observed in what may even be inland waters of the United States, even under the United States' theory of this case.

6. *Branson Deposition* (From 1951 through 1953 Mr. Branson was Alaska Enforcement Agent for the Cook Inlet District, Bureau of Commercial Fisheries)

(a) Page 42:

> "Q. I see. All right, but now, again, this instance that you referred to in the Russian event is the only incident involving a non-Canadian halibut vessel of which you are aware, is that correct, in the area north and generally west of Shuyak Island?
>
> A. That's the only time I recall having seen a foreign vessel fishing other than a Canadian."

The area described is not shown to be within the disputed area.

(b) Page 39:

> "Q. Have the Japanese entered either Shelikof Strait or Cook Inlet?
>
> A. I have seen Japanese ships in transit through Shelikof Strait, but never in Cook Inlet. This is Japanese fishing ships, particularly—specifically.
>
> Q. I see. In transit, you mean from what, Bristol Bay and heading for the Gulf, something like that?

A. I have no idea where they came from or where they were going, but they were in Shelikof Strait traveling.

Q. You are not aware that they [Japanese ships] ever entered the area bounded by a line from Cape Douglas through the Barren Islands on to Cape Elizabeth?

A. I've never seen one in there.

Q. And what about vessels of any other nation?

A. North of a line between Cape Douglas and the Barren Islands, no." (pp. 39-40)

The above quoted testimony fails to show that any foreign vessels were afforded the right of innocent passage in Cook Inlet. Moreover, the testimony amply demonstrates the fact that Cook Inlet was respected by foreign nations as inland waters.

7. *O'Dale Deposition* (Mr. O'Dale from 1901 to at least 1910 operated vessels and prospected in the Cook Inlet area of Alaska)

(a) Pages 20-21:

"Q. [By Mr. Cranston] You were talking about all the waters of Cook Inlet?

A. Yes.

Q. Did you ever see any foreign fishing vessels in Cook Inlet?

A. Oh, there was other vessels, yes, coming in more all the time.

Q. Were there foreign countries, say, Canadians or Japanese?

A. There was no foreign country boats while I was working for the Fish and Game Commission.

Q. Did you ever see any foreign fishing boats when you were running your mail boat in Cook Inlet?

A. No.

Q. Or your gas boat back around 1901, or around that time?

A. No. We never had any foreign boats in there at that time. But there was a foreign boat come in. It was a freighter or a passenger boat or something which they had a license to do.

Q. Did you ever see any foreign fishing boats?

A. No."

This testimony shows that no foreign vessels were permitted in Cook Inlet, even in the earliest days except by permission, such as a license.

8. *Studdert Deposition* (Mr. Studdert was a Fish Warden in the Cook Inlet area for two years, including the year 1924, for the United States Bureau of Fisheries)

(a) Page 22:

"Q. Do you recall actually seeing any foreign vessels there?

A. Well, I think that there were some foreign shipping around through there at the time, you know, in the lower Cook Inlet.

Q. What about foreign fishing vessels?

A. Well, there could have been, and I wouldn't say that there weren't, because fish were at quite a price at that time, and, you know, there was—the fish were desirable to get, and so they poached a lot up in that area—

Q. All right, and—

A. And we were to have the job of picking them up and getting them out of there, you see.

Q. In other words, if you would have seen one, you would have gotten her out of there?

A. That's right.

Q. And why would you have gotten the vessel out of there, Mr. Studdert?

A. Well, if it was a foreign ship, why you would not only get her out, but you would seize the ship, you know, if you could."